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IN THE

Supreme Court of the United States

The Programmers Guild, Inc.; American Engineering Association, Inc.; Bright Future Jobs; Michael Amanti; Mark Blackburn; Toni L. Chester; David Huber; John G. Marson; Harrison Picot, II; Paul E. Polak; Mike Rothschild; Robert Sanchez; Stephen Berry; and Stephanie M. Berry,

Petitioners,

v.

Janet Napolitano and United States Department of Homeland Security,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONERS

BARNABY W. ZALL
Counsel of Record
Weinberg & Jacobs, LLP
11300 Rockville Pike, #1200
Rockville, MD 20852
(301) 231-6943
bzall@bzall.com

JOHN M. MIANO
GARRETT ROE
MICHAEL HETHMON
Immigration Reform Law Institute
25 Massachusetts Ave. N.W.
Suite 335
Washington, DC 20001

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INTRODUCTION

The ultimate question in this case is simple: Can the Secretary use "foreign student" visas to permit aliens to seek work in the United States?

The statute says no. The foreign student provision provides entrance to the United States "temporarily and *solely* for the purpose of pursuing ... a course of study." 8 U.S.C. § 1101(a)(15)(F)(i) (emphasis added). Unauthorized employment by foreign students is prohibited. *See, e.g., Kirong v. Mukasey*, 529 F.3d 800, 802 (8th Cir. 2008).

Nor has Congress given overt or tacit approval to such proposals. When Respondents proposed such employment in 1990, Congress expressly rejected the proposal because it "did not contain any labor safeguards." H. R. Rep. No. 101-723, at 45, 67 (1990).

In fact, Congress expressly rejected the use of the F-1 student visas for immigration admissions. The 1990 Committee Report noted: "this provision is not to be used for training for future immigration prospects." *Id.*

Nevertheless, Respondents promulgated a Rule in 1991 permitting a limited amount of post-graduation employment by foreign "students," saying:

> The F-1 student employment program in the final rule represents a careful balance between the Service's desire to allow foreign students every opportunity to further their educational objectives in this country and the need to avoid adversely affecting the domestic labor market. The House Judiciary Committee report on HR 4300 ... demonstrated a clear Congressional concern about the [Immigration and Naturalization] Service's plan to expand student employment authorization without any built-in labor safeguards.

56 Fed. Reg. 55,610 (Oct. 29, 1991).

When employers sought additional foreign student workers (in large part because they were less expensive and easily exploited),[1] Congress rejected those proposals in 2006 and 2007. Petition for a Writ of Certiorari p. 4. ("Pet."). Nevertheless, in 2008, Respondents promulgated an Interim Final Rule which went beyond even the proposals rejected by Congress. Pet. App. 37a–98a.

This change was based on employment, not educational, purposes: "This interim final rule addresses the immediate competitive disadvantage faced by U.S. high-tech industries, and thus may quickly ameliorate some of the adverse impacts on the U.S. economy." Pet. App. 56a–57a; 73 Fed. Reg. 18,947 (Apr. 8, 2008). There was no longer any connection to a required "course of study."

As then-Secretary Michael Chertoff put it:[2]

> What this does is it allows us to continue to keep smart, well-educated foreign students who want to come over and ultimately get a work visa, allows us to keep them in place doing productive work while they are awaiting the work visa process.

This is exactly what Congress rejected in 1990: "This provision is not to be used for training for future immigration prospects." H. R. Rep. No. 101-723, at 67.

The ultimate question in this case, then, is whether Respondents have the power to bypass, by regulation, statutory limits on the employment of aliens admit-

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[1] Pet. 7.

[2] U.S. Dept. of Homeland Security, Press Release, "Remarks by Homeland Security Secretary Michael Chertoff and Department of Commerce Secretary Gutierrez at the State of Immigration Address," June 9, 2008, ("Chertoff Remarks"), *reprinted* in Pet. App. 113a–121a.

ted on F-1 foreign student visas in order to ameliorate a perceived "competitive disadvantage faced by U.S. high-tech industries."

The lower courts, however, refused to permit the claim to proceed, finding that Petitioners—all of whom are (or represent) the type of scientific, technical, engineering or mathematics ("STEM") workers affected by the challenged rules—were not within the "zone-of-interest" of the "foreign student" provisions, and thus lacked prudential standing to maintain this case. Pet. App. 8a; 11a; 18a.

The reason for the Court to take up this Question is that the Third Circuit's opinion erected two new and unjustified barriers to prudential standing: a requirement that the statute in question contain express language stating that Americans are to be protected; and a further requirement that Congress not have "acquiesced" in the agency's actions. Petitioners showed the errors of the lower court's logic, and nothing in Respondents' Opposition has refuted Petitioners' position.

Prudential standing requirements provide powerful discretionary powers to courts. The Court should take up this Question because the Third Circuit's opinion converts the "zone of interest" test for prudential standing from a shield against judicial overreaching into a sword to protect agency overreaching.

ARGUMENT

I. Petitioners Have Article III Standing

Science, technology, engineering and mathematics are specialized fields which Congress has declared of particular interest to the United States, and has provided billions of dollars to nurture each year. Pet. 7.

The only issue presently before the Court is whether American STEM workers may challenge a rule which

permits foreign STEM workers to compete for jobs for which the American workers are qualified and willing. Both the Third Circuit and Respondents here say that simply calling the alien workers "students" and admitting them under a statutory provision related "solely" to a "course of study" eliminates American workers' standing to challenge their admission, even though the aliens are not students, and their admission is for work, rather than a course of study.

This manipulation of names and visa categories ignores the real harm done to the American workers. The Third Circuit itself showed that Petitioners have Article III standing:

> Those F-1 students compete with the plaintiffs for STEM jobs. Absent the [Agency's action], those students would be forced to return to their home countries after 12 months of OPT and would not threaten the plaintiffs' job prospects.

Pet. App. 8a; Pet. 15.

The Third Circuit noted that approximately 40,000 OPT "students" would be permitted to compete for jobs for which Petitioners were eligible. Pet. App. 4a. Those alien workers are in the United States solely because the challenged agency rule deems them "foreign students" even after they have finished their courses of study.

Standing requires (1) a concrete and particularized "injury in fact" that is actual or imminent; (2) the injury be "fairly traceable" to the challenged action; and (3) that it is likely that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

Petitioners' injury is that they are foreclosed from applying for some American jobs which are reserved solely for OPT "students." Pet. 10. To show that their injury was immediate and concrete, Petitioners submitted with their Complaint copies of actual job advertisements for which they were qualified and willing, but which were reserved solely for OPT "students." Pet. 10; Pet. App.123a–135a.

Petitioners' injury is "fairly traceable" to the Secretary's action because these additional foreign workers are competing for work in the United States only because of the Secretary's Rule. Pet. App. 8a. Finally, as the Third Circuit noted, Petitioners' injury is redressable because, "absent" the Rule, the alien "students" would not threaten the plaintiffs' job prospects. Pet. App. 8a.

Petitioners have Article III standing to maintain this case.

II. Petitioners Have Prudential Standing

The only issue the Third Circuit addressed was the prudential standing "zone of interests" test. The Third Circuit held that U.S. workers were not within the zone of interests protected by the F-1 statute for two reasons:

1) the "foreign student" subsection does not contain express language to that effect; and,

2) there was no congressional interest to protect American workers; instead Congress was interested in using the "foreign student" provision to resolve labor shortages in high-tech industries. Pet. App. 10a–11a.

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[3] The Secretary also notes, however, that if Petitioners' interpretation of the statutory provision is correct (that is, if the "foreign student" provision does not authorize work after graduation), that interpretation "would bring their claims within the zone of interests protected by the provision." Opp. 12, n. 2.

The Secretary asserts that this interpretation of the zone of interest test is correct and recites the same reasoning.[3] Opp'n to Writ of Cert. 12–13 ("Opp."). Yet the opinion below and the Secretary's position cannot survive a review of recent legislative history.

A. Respondents Ignored the 1990 and 1991 Congressional and Agency Pronouncements That Show the Third Circuit Was Wrong in Its Description of the Zone of Interests Protected by the "Foreign Student" Provision:

Petitioners showed, in detail, the errors of the Third Circuit's historical and Congressional intent survey. Pet. 4–5, 11–12, 19–23. In particular, the Third Circuit never addressed the 1990 Congressional Report rejecting Respondents' proposals to expand foreign student employment because it "did not contain any labor safeguards." H. R. Rep. No. 101-723, at 45, 67.

Nor can the Third Circuit's suggestion that Congress was not concerned about protecting domestic workers, but was concerned with "increasing the country's pool of available STEM workers" (Pet. 10a) be reconciled with Congress's flat statement in 1990 that the F-1 provision "not be used for training for future immigration prospects." *Id.*

Nor did the Third Circuit address Respondents' own 1991 regulations which explained:

> The House Judiciary Committee report on HR 4300 ... demonstrated a clear Congressional concern about the [Immigration and Naturalization] Service's plan to expand student employment authorization without any built-in labor safeguards.

56 Fed. Reg. 55,610.

The Secretary relegates the 1990 Congressional Report to a footnote. Opp. 13–14, n. 3. Her footnote, however, veers into the bizarre. The Secretary claims that the Congressional Report is "unpersuasive" because it was "not connected to any statutory language controlling F-1 status." *Id.* Not only does a simple reading of the quoted report belie that odd assertion,[4] so does Respondents' own 1991 publication: "The House Judiciary Committee report on HR 4300 ... demonstrated a clear Congressional concern about the [Immigration and Naturalization] Service's plan to expand student employment authorization without any built-in labor safeguards." 56 Fed. Reg. 55,610. Perhaps that is why the Secretary neglected to mention this crucial report in her own analysis in her Opposition.

It is impossible to reconcile the Third Circuit's claim that Congress was not interested in protecting American workers against competition by foreign students with these two historical facts. Congress was interested in protecting American workers in the "F-1" statute, and said so. Petitioners are within the zone of interests of this provision.

B. The Third Circuit's New "Zone-of-Interest" Test Conflicts with That of Other Courts:

The Secretary posits no conflicts between the Third Circuit's "zone-of-interest" analysis and that of other

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[4] "The Committee notes that a number of proposals were under consideration by the INS which would have expanded work authorization for students. These proposals fell short of guaranteeing the proper academic standards and did not contain any labor safeguards. The Committee notes that this provision is not to be used for training for future immigration prospects." H. R. Rep. No. 101-723, at 67.

courts. Opp. 11–16. Petitioners, on the other hand, demonstrated specific conflicts in the Petition. Pet. 18, 24–28.

The Third Circuit's analysis conflicts with over 20 years of consistent case law that has permitted U.S. workers to challenge agency actions that increased competition in their specific job fields. In *Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798 (D.C. Cir. 1985), the plaintiffs had standing to challenge the agency's allowing aliens to work on visitor visas[5] rather than worker visas.[6] In *Int'l Longshoremen's & Warehousemen's Union v. Meese*, 891 F.2d 1374 (9th Cir. 1989), American workers had standing to challenge the agency's allowing alien crane operators to work on "crew member" visas[7] rather than temporary worker visas.[8] In both cases, the court invalidated the regulation. Here, the agency is allowing aliens to work on student visas[9] rather than temporary worker visas,[10] yet the Third Circuit prohibited Petitioners from challenging the rule.

The greatest conflict between the Third Circuit and other courts is whether there needs to be explicit protective language in the statute. The Third Circuit ignored the expressed Congressional and agency intent to protect U.S workers under F-1 visas. Instead it looked for worker protection language solely within the F-1 subparagraph. Pet. App. 10a–11a.

There are no express worker protections in the F-1 subsection, because Congress did not intend this provi-

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[5] 8 U.S.C. § 1101(a)(15)(B)(i).
[6] 8 U.S.C. § 1101(a)(15)(H)(ii)(B).
[7] 8 U.S.C. § 1101(a)(15)(D).
[8] 8 U.S.C. § 1101(a)(15)(H)(ii)(B).
[9] 8 U.S.C. § 1101(a)(15)(F)(i).
[10] 8 U.S.C. § 1101(a)(15)(H)(i)(B).

sion to authorize work. "The Committee notes that this provision is not to be used for training for future immigration prospects." H. R. Rep. No. 101-723, at 67.

The Third Circuit's search for express language conflicts with this Court's repeated directive that there need be no indication of congressional purpose to benefit the would-be plaintiff. *Clarke v. Securities Indus. Ass'n.*, 479 U.S. 388, 399–400 (1987), *Nat'l Credit Union Admin. v. First Nat'l Bank*, 522 U.S. 479, 491 (1998).

The Third Circuit's analysis also conflicts with the circuits that have held the statute in question must be considered in the context of the overall statutory scheme. *See, e.g. Mova v. Shalala*, 140 F.3d 1060, 1074–1075 (D.C. Cir. 1998); *Banks v. Sec'y of the Ind. Family & Social Servs. Admin.*, 997 F.2d 231, 242 (7th Cir. 1993); *Hernandez-Avalos v. Immigration and Naturalization Serv.*, 50 F.3d 842, 847 (10th Cir. 1995).

This Court has acknowledged a lack of clarity in the zone of interest test. *Nat'l Credit Union Admin.*, 522 U.S. at 488. Commentators have as well. *See* e.g. Jonathan R. Siegel, "Zone of Interests," 92 Geo. L.J. 317, 337–341 (2004) (describing how ambiguities in the zone of interest test produce different outcomes in the various circuits). The Third Circuit's new requirements needlessly muddy this test even further.

III. The Secretary's Assertion of "Discretion" Cannot Save This Facially Invalid Rule

The Secretary claims that she should be given discretion to change the statutory provisions of the F-1 visa. Opp. 12, n. 2. As the Secretary points out, there is no language that prohibits a foreign student from working. *Id.* There is also no language in (F)(i) that *permits* a foreign student to work. *See* 8 U.S.C. § 1101(a)(15)(F)(i); Pet. 19–20.

Exercise of administrative discretion to explain or clarify the nature of a "course of study" would likely be within the Secretary's power. *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999).[11] Any "discretion" the Secretary exercises, however, cannot expand beyond the statutory requirement that lawful presence for an F-1 visa holder must be "solely for a course of study." *Id.* Nor can the Secretary exercise discretion to reverse Congressional intent that the F-1 provision "is not to be used for training for future immigration prospects." H. R. Rep. No. 101-723, at 67. Yet that is exactly how Secretary Chertoff described the 2008 Interim Rule. Chertoff Remarks, *supra*.

The 2008 version of OPT was not an exercise of reasonable administrative discretion, since it changes the purpose of the underlying statutory provision. The revised OPT program is not tied in any way to a "course of study." In fact, the 2008 version of OPT is not about "students" or "a course of study" at all. It is about the availability of workers to industry. *See* Pet. 10.

These OPT "students" are not learning anything; they are working, or even just looking for work. Being

[11] However, "deference is appropriate only where 'Congress has not directly addressed the precise question at issue' through the statutory context." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007) (quoting *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984). Congress, not DHS, defines how a student can remain in his status within 8 U.S.C. § 1101(a)(15)(F)(i). The student must be "a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purposes of pursuing such a course of study...at an established [school]..." *Id.* Pursuant to the Rule, the aliens are not *bona fide* students and are not "at an established [school]" pursuing a "course of study." They have graduated and are either working, or unemployed and searching for work.

unemployed may be many things, but it is not a part of a "course of study" in STEM fields.

Nor is the employment for the benefit of the "students." As repeated studies show, the "students" are particularly vulnerable to exploitation and abuse. Pet. 7. And that potential for abuse and exploitation undercuts the working conditions and job opportunities for American STEM workers such as Petitioners, which Congress expressly opposed. *See id.*

Thus, there is no conceivable exercise of discretion which can permit the Secretary to convert a legitimate foreign student program, with perhaps a few isolated instances of real curricular augmentation through on-the-job training, into a work-related program designed to circumvent a strict Congressional quota on the annual admissions of foreign specialty workers.

Petitioners have standing to bring this case. Petitioners are within the zone of interest of the F-1 provision. The Secretary's discretion does not extend to denying American STEM workers the opportunity to challenge agency overreach. This court should review this Question to prevent the Third Circuit's opinion from distorting the zone-of-interests test.

* * * * *

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted.

Barnaby W. Zall
Counsel of Record
WEINBERG & JACOBS, LLP
11300 Rockville Pike, #1200
Rockville, MD 20852
(301) 231-6943
bzall@bzall.com

John M. Miano
Garrett Roe
Michael Hethmon
IMMIGRATION REFORM
LAW INSTITUTE
25 Massachusetts Ave. N.W.
Suite 335
Washington, DC 20001

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